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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-44

ROBERT BURRELL, *Petitioner,*
v.
MILTON McCRAY, *Respondent.*

SERGEANT V. D. SMITH, ETC., *Petitioner,*
v.
MILTON McCRAY, *Respondent.*

GERALD McCLELLAN, ET AL., *Petitioners,*
v.
JAMES E. X. STOKES, *Respondent.*

DR. HAROLD M. BOSLOW, ET AL., *Petitioners,*
v.
JOHN WASHINGTON, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONERS' REPLY BRIEF

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ARGUMENT

The Petitioners offer this Reply Brief in order to disperse some of the fog which the Briefs filed by Respondents and some amici have cast over this case. After squaring some misrepresentations of fact concerning the Maryland Inmate Grievance Commission,

Petitioners will comment upon some of the legal reasoning presented in those Briefs.[1]

I.

This Court's decisions generally do not require the exhaustion of State remedies prior to the institution of suit in federal court under 42 U.S.C. §1983. This rule, and its subsequent envolvement, was largely premised on the idea that one of the "main aims" of section 1983 was to provide "a remedy where state law was inadequate," *Monroe v. Pape*, 365 U.S. 167, 173, 81 S. Ct. 473, 477 (1961). In cases decided since, and in accordance with, *Monroe*, the available State remedies have been found to be ineffective.[2] *See Houghton v. Shafer*, 392 U.S. 639, 640, 88 S. Ct. 2119, 2120 (1968); *McNeese v. Board of Educ.*, 373 U.S. 668, 674-75, 83 S. Ct. 1433, 1437 (1963); *see also King v. Smith*, 392 U.S. 309, 312 n.4, 88 S. Ct. 2128, 2131 n.4 (1968); *Damico v. California*, 389 U.S. 416, 88 S. Ct. 526 (1967). In *Eisen v. Eastman*, 421 F.2d 560, 569 (2d Cir. 1969), *cert. denied*, 400 U.S. 841, 91 S. Ct. 82 (1970), the United States Court of Appeals for the Second Circuit, speaking through Judge Friendly, read these decisions

> as simply condemning a wooden application of the exhaustion doctrine in cases under the Civil Rights Act. Exhaustion of state administrative remedies is not required where the administrative remedy is inadequate, as in *McNeese*, or where it is certainly or probably futile, as in *Damico*, *Smith* and *Houghton*.

[1] References to Briefs will be cited as follows: Brief of Petitioners, "Pet. Br."; Brief of Respondents, "Resp. Br."; Brief of American Civil Liberties Union, et al., "ACLU Br."; Brief of the Center for Correctional Justice, "CCJ Br"; and, Brief of Amici Curiae in Support of Petitioners, "Pet. Amici Br."

[2] *See* pages 14-15 *infra* for an expanded discussion.

See also Gibson v. Berryhill, 411 U.S. 564, 575 n.14, 93 S. Ct. 1689, 1696 n.14 (1973); *Fuentes v. Roher*, 519 F.2d 379, 386 (2d Cir. 1975); *Bonner v. Coughlin*, 517 F.2d 1311, 1320 (7th Cir. 1975) (Stevens, J.); *Blanton v. State Univ. of N.Y.*, 489 F.2d 377, 383-84 (2d Cir. 1973).

The crucial difference between this case and *Monroe* and its progeny is the effectiveness of the available State remedy. Maryland's Inmate Grievance Commission (Commission) provides a prisoner with a means of having a complaint heard "promptly, fairly, and fully," *State v. McCray*, 267 Md. 111, 144, 297 A.2d 265, 282 (1972). The District Court found the Commission to be a "viable," "complete," "effective," and "swift" remedy, *McCray v. Burrell*, 367 F. Supp. 1191, 1204, 1205, 1209 (D. Md. 1973), and these are some of the characteristics which serve to distinguish this action from *Monroe* and other cases involving seriously defective State remedies. The Federal Judicial Center lauds the practice of exhausting an administrative grievance procedure prior to going into federal court, as is the custom in some jurisdictions. "[T]he grievance procedure may satisfactorily resolve the question," and, "resorting to the grievance procedure first avoids the risk that the issue may arise in a later judicial proceeding." The Center has also suggested that there might not be a "deprivation of civil rights under 42 U.S.C. §1983 until readily available, prompt administrative recourse is tried," Federal Judicial Center, Recommended Procedures for Handling Prisoner Civil Rights Cases in the Federal Courts 20 (Tent. Report 1976).

Respondents and some amici have sought to tarnish the District Court's findings regarding the efficacy of the Commission. The Respondents charge that inmates cannot cross-examine witnesses at Commission hearings (Resp. Br. 85), have no pre-hearing discovery rights

(Resp. Br. 84), and that there are not any standards to guide the Secretary's review of a Commission order (Resp. Br. 77).[3] Quite to the contrary, an inmate has the right to cross-examine witnesses, subpoena evidence and witnesses, and review documentary evidence, Maryland Code (1957, 1971 Repl. Vol., 1975 Cum. Supp.) Art. 41, 204F(g), (h). That the Commission's and Secretary's discretion in performing their various tasks is not unbounded is also clear. *See* 59 Op. Att'y Gen. 438, 445-47 (Md. 1974).[4]

The Respondents try to downgrade the legitimacy of the Commission by asserting that 54% of the complaints received by the Commission are "dismissed without a hearing" (Resp. Br. 81).[5] This is an unfortunate choice of language, resulting in seriously misleading connotations. Complaints before the Commission

[3] Respondents (Resp. Br. 77) and an amicus (ACLU Br. 7 n.1) suggest that the Commission merely "advises" or "recommends" its findings to the Secretary. In fact, the Commission issues an *order*, which, if wholly adverse to the inmate, can only be appealed directly to Circuit Court, and which, if at all favorable to the inmate, *must* be reviewed within 15 days by the Secretary. Maryland Code (1957, 1971 Repl. Vol., 1975 Cum. Supp.) Art. 41, §204F(f)(1), (2). It should also be noted that if an inmate obtains relief through the Commission process the State may *not* appeal such a decision. *See* Code (1957, 1971 Repl. Vol.) Art. 41, §256; Board of Liquor License Comm'rs v. Leone, 249 Md. 263, 239 A.2d 82 (1968); Maryland Bd. of Pharmacy v. Peco, Inc., 234 Md. 200, 198 A.2d 273 (1964).

[4] It is further contended that the Secretary's "normal procedure" of reviewing a Commission order is to go beyond the record and solicit outside opinion (Resp. Br. 73, 75). This "normal procedure" was only employed once, and then in an exceptional situation involving a prison riot. *See* Washington v. Boslow, 375 F. Supp. 1298, 1301 (D. Md. 1974).

[5] An amicus also impugns the Commission's ability to dismiss a complaint (CCJ Br. 21). This friend of the Court further charges that a "major failure" of the Commission's procedure is the absence of a requirement that the reasons for action taken by the Commission be reduced to writing (CCJ

are not dismissed willy-nilly. Rather, an inmate is entitled to a hearing on any complaint over which the Commission has jurisdiction and which is not wholly lacking in merit on its face. Code (1957, 1971 Repl. Vol., 1975 Cum. Supp.) Art. 41, §204F(e), (f). These obstacles are certainly no more onerous than those faced by a plaintiff in federal court. *See* Fed. R. Civ. P. 12(b)(1), (2), (6). Furthermore, Respondents have improperly inflated the percentage of "dismissed" complaints by including in their computation complaints which are resolved to the inmate's satisfaction prior to hearing.[6] *Compare* Fed. R. Civ. P. 16.

Br. 22). Setting aside the question whether writings are essential to the effectiveness of a procedure, it must be noted that, in fact, the Commission does prepare a written opinion in every case it hears. An example of such a writing, in the customary four-part format, may be found in Addendum D to Respondents' Brief (Resp. Br. 1d-4d). In addition, whether or not a statute or regulation compels the Commission to issue a written opinion, the common law of Maryland requires State agencies to base their administrative actions on findings of fact, or an assignment of reasons for the result reached. If an agency fails to adhere to this standard, and takes any action which is not supported by the evidence in the record, Maryland's courts will remand the matter to the agency for findings of fact. *See* Baker v. Board of Trustees, 269 Md. 740, 747, 309 A.2d 768, 771-72 (1973); Adams v. Board of Trustees, 215 Md. 188, 195, 137 A.2d 151, 155 (1957).

[6] The Respondents have taken other liberties with their statistical offerings. They report (Resp. Br. 47) that only 11.4% of complaints received by the Commission were determined to be meritorious. Ignoring the question whether an 11.4% figure is of any significance, it must be pointed out that this percentage was obtained by dividing the number of complaints found to be meritorious (191) by the total number of complaints (1680) received by the Commission during a given time. Actually, the divisor in this fraction is much too large, as it includes 936 cases which were disposed of administratively. Subtracting these 936 complaints from 1680 leaves 744, which, when divided by 191, results in the more meaningful observation that in over 25% of the cases fully entertained by the Commission some relief was granted. For statistical data on the Maryland Inmate Grievance Commission, *see* chart contained in Pet. Br. 89 n.34.

While many of the suggestions offered by Respondents to improve the effectiveness of the federal courts' handling of prisoner claims, and to increase the effectiveness of the Commission as an adequate administrative remedy might appear liminally attractive, none have ever been proven in practice. It is suggested, for example, that "the [federal] courts can assign law students to investigate and evaluate prisoner claims" (Resp. Br. 56). How this approach would be more beneficial than having the five highly qualified professionals who comprise the Commission do the reviewing pursuant to "federal or State laws or constitutional requirements," subject to judicial review, is left unexplained. Code (1957, 1971 Repl. Vol., 1975 Cum. Supp.) Art. 41, §204F(e).

It is charged that the institution of a program to train prisoners as "jailhouse lawyers" would be an effective means of providing prisoners with legal assistance, and would result in the filing of non-frivolous cases (Resp. Br. 57-58). Once again, Respondents are silent about how such a system would better serve the interests of prison inmates — if it would work at all — than the Commission does at present, and will do in the future as it develops and matures.

Finally, the Respondents claim that the Commission cannot effectively resolve grievances until it provides "for genuine prisoner input beyond the filing of a complaint" (Resp. Br. 59). Are they suggesting that a responsive mechanism cannot be achieved until prisoners serve on the Commission? If this is so, why are Respondents so eager to gain instantaneous access to the federal courts, a forum which shares a common "defect" with the Commission, *i.e.*, there have not been any prisoners appointed to the federal bench.

After the workings of the Maryland Inmate Grievance Commission are realistically examined, what emerges is a clear picture of a State administrative body which deals effectively and fairly with inmate grievances. The procedural safeguards which are built into the system are more than adequate to ensure the evenhanded treatment of complaints. *See Washington v. Boslow*, 375 F. Supp. 1298, 1300-02 (D. Md. 1974); *McCray v. Burrell*, 367 F. Supp. 1191, 1200, 1202-05 (D. Md. 1973); *State v. McCray*, 267 Md. 111, 144, 297 A.2d 265, 282 (1972); Comment, 35 Md. L. Rev. 458, 460-64 (1976). The imperative need urged by Respondents for bypassing the State remedy on the grounds of non-responsiveness is not enhanced when it is realized that in the 37 instances between 1969 and 1973 where Respondent McCray filed federal court actions, the Court has never granted any of the relief prayed for. *See McCray v. Burrell, supra*, 367 F. Supp. at 1217-18 (Appendix A).[7]

II.

"The doctrine of exhaustion of administrative remedies is well established in the jurisprudence of administrative law," *McKart v. United States*, 395 U.S. 185, 193, 89 S. Ct. 1657, 1662 (1969). Indeed, requiring exhaustion is the general rule. Thus it is no wonder that eminent commentators ask why "a 'federal right' under the Civil Rights Act [is] more deserving of immediate judicial protection than a federal right under the Administrative Procedure Act," and why "must federal administrative remedies be exhausted in circumstances in which state administrative remedies need not be exhausted." K.C. Davis, Administrative Law Treatise §20.01, at 646 (1970 Supp.); H.J. Friendly, Federal Jurisdiction: A

[7] Respondents assert that the "hopelessness and futility" of pursuing relief from the Commission is demonstrated by the fact that of 19 prisoner complaints alleging physical

General View 100 (1973). The reasons for demanding the exhaustion of administrative remedies, in general, have often been eloquently stated, *see, e.g., McKart v. United States, supra,* 395 U.S. at 193-95, 89 S. Ct. at 1662-63, and the necessity of exhausting State administrative remedies, in particular, has been a part of our law for many years, *Prentis v. Atlantic Coast Line Co.,* 211 U.S. 210, 29 S. Ct. 67 (1908). The stark contrast between the "careful articulation of the exhaustion requirement" in *McKart,* and the casual treatment accorded the exhaustion concept in some cases arising under the Civil Rights Act has not escaped the eyes of the commentators. *See* H. Hart & H. Wechsler, The Federal Courts and the Federal System 985 (2d ed. 1973).

While State prisoners should not be treated any differently than other civil rights plaintiffs, *Wilwording v. Swenson,* 404 U.S. 249, 251, 92 S. Ct. 407, 409 (1971), "the fact that [they] retain rights under the Due Process Clause in no way implies that these rights are not subject to restrictions imposed by the nature of the regime to which they have been lawfully committed," *Wolff v. McDonnell,* 418 U.S. 539, 556, 94 S. Ct. 2963, 2975 (1974). Consequently, they should not be exempted from exhausting an adequate State administrative remedy before seeking relief in federal court. The adequacy of the available remedy is the primary feature which serves to distinguish this case from others where no exhaustion was required. In addition, however, there

mistreatment by prison personnel, not one was found to be meritorious (Resp. Br. 22). This is far from surprising. There has only been one case in the United States District Court for the District of Maryland involving State prison officials where such an allegation was substantiated. There, three judgments returned in favor of the plaintiffs totalled only $600, and no punitive damages were awarded.

are other permissible considerations which make this rather cold distinction especially attractive in a prisoners' rights setting, as the reasons for requiring the exhaustion of State administrative remedies in the context of prisoner complaints are particularly compelling, H.J. Friendly, *supra,* at 105.

Treating State prisoners identically with other citizens is a laudable general rule, and in many situations the Constitution would not tolerate anything less. To the extent, though, that State prisoners *are* different from other groups of persons, they can, and should, be dealt with differently. *See Wolff v. McDonnell, supra,* 418 U.S. at 556, 94 S. Ct. at 2975 (1974); *McCray v. Burrell,* 516 F.2d 357, 376 (4th Cir. 1975) (Widener, J.). "The prohibition of the Equal Protection Clause goes no further than the invidious discrimination," *Williamson v. Lee Optical of Oklahoma,* 348 U.S. 483, 489, 75 S. Ct. 461, 465 (1955), and only "invidious discrimination" offends the Constitution, *Ferguson v. Skrupa,* 372 U.S. 726, 732, 83 S. Ct. 1028, 1032 (1963). So long as a given procedure does not discriminate against State prisoners arbitrarily, but, rather, is predicated upon legitimate considerations, the Constitution will not be offended. The Constitution allows rationally based classification, and distinguishing between State prisoners and other potential civil rights plaintiffs for purposes of requiring exhaustion of State administrative remedies, where these remedies are adequate, makes both good sense and sound constitutional law.

Nowhere are the reasons for distinguishing the complaints of State prisoners from those of non-prisoners more eloquently stated than in this Court's opinion in *Preiser v. Rodriguez,* 411 U.S. 475, 491-92, 93 S. Ct. 1827, 1837 (1973) (emphasis supplied):

It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons. The relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State and a private citizen. For state prisoners, eating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the State, and so the possibilities for litigation under the Fourteenth Amendment are boundless. What for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the State. Since these internal problems of state prisons involve *issues so peculiarly within state authority and expertise, the States have an important interest in not being bypassed in the correction of those problems.* Moreover, because most potential litigation involving state prisoners arises on a day-to-day basis, it is most efficiently and properly handled by the state administrative bodies and state courts, which are, for the most part, familiar with the grievances of state prisoners and in a better physical and practical position to deal with those grievances.

See also McCray v. Burrell, 367 F. Supp. 1191, 1198 (D. Md. 1973). Judge Friendly has also spoken forcefully on this general point, in the course of advocating the sagacity of requiring the exhaustion of state *judicial* remedies.

> The relationship of the state to prisoners in its institutions is sufficiently different from its relations to other persons complaining of denial of civil rights guaranteed by the Constitution to warrant a requirement of initial invocation of state judicial remedies not usually imposed. These are people who have been adjudged guilty of breaking state criminal laws, often with very grave consequences

> to others. The state is in contact with them not merely daily but throughout the day — and the night as well. Their grievances are frequently of a sort that cannot be cured by prescription of a general rule but require determination of the facts of a specific incident. There are serious physical problems in hearing these cases in a federal court, usually many miles away, as distinguished from hearing by a state judge in a nearby county courthouse or in the prison itself.

H.J. Friendly, *supra,* at 107.

III.

This Court has recognized that the strength of our federal system of government depends in large part on an acute awareness of the sensitivity of federal-State relations, and the necessity of minimizing conflict between the two. The concept of "Our Federalism" represents "a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States," *Younger v. Harris,* 401 U.S. 37, 44, 91 S. Ct. 746, 750-51 (1971). Although the procedural posture and specific facts in *Younger* were different from those present here, the underlying rationale which led to the *Younger* result applies with equal force to this case. "[D]eference to the principles of federalism" should be observed in the presence of an adequate State administrative remedy, *Huffman v. Pursue, Ltd.,* 420 U.S. 592, 599, 95 S. Ct. 1200, 1206 (1975).[8] Requiring

[8] "The issue in the present case concerns directly a basic problem of American federalism: the relation of the Nation to the States in the critically important sphere of municipal law administration," Monroe v. Pape, 365 U.S. 167, 222, 81 S. Ct. 473, 503 (1961) (Frankfurter, J., dissenting).

State prisoners to seek relief through the Commission mechanism before instituting, if still necessary, a civil rights action in federal court, strikes a just balance between each governmental interest. The State's concern over its prisoners and correctional system will be accommodated, and the federal interest to ensure adherence to constitutional prescriptions is also guaranteed.

Section 1983 of the Civil Rights Act is not a "sovereign talisman,"[9] *see Paul v. Davis*, 44 U.S.L.W. 4337 (U.S. Mar. 23, 1976) (where this Court reversed an expansive interpretation of the substantive rights cognizable under section 1983), and in the absence of express statutory language to the contrary, general legal principles surrounding its administration should not differ from those applicable to other laws. While the legal arguments for demanding the exhaustion of adequate State administrative remedies are well founded, the practical considerations involved in prisoner cases are extraordinarily compelling. The staggering burden which prisoner civil rights cases place on the federal courts is well documented.

In a statement issued on January 3, 1976, Mr. Chief Justice Burger said that one-sixth of the cases on the civil docket of federal courts are prisoner petitions, "most of which could be handled effectively and fairly within the prison systems," *Chief Justice Burger Issues Yearend Report*, 62 A.B.A.J. 189, 190 (1976). The problem is one which has received the careful attention of the Federal Judicial Center, which has released an extensive report on the subject. *See* Federal Judicial Center, Recommended Procedures for Handling Prisoner Civil Rights Cases in the Federal Courts (Tent.

[9] Wood v. Lucy, Lady-Duff Gordon, 222 N.Y. 88, 91, 118 N.E. 214 (1917) (Cardozo, J.).

Report 1976). The District Court also identified the formidable burdens which a non-exhaustion rule imposes on judicial administration, placing particular emphasis upon the situation prevailing in the United States District Court for the District of Maryland, and in the United States Court of Appeals for the Fourth Circuit, *McCray v. Burrell*, 367 F. Supp. 1191, 1193-94 (D. Md. 1973). "Federal judges should not be dealing with prisoner complaints which, although important to a prisoner, are so minor that any well-run institution should be able to resolve them fairly without resort to federal judges," *Chief Justice Burger Issues Yearend Report, supra*, at 190. These "very practical notions of judicial efficiency" cannot be ignored. "A complaining party may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene," *McKart v. United States, supra*, 395 U.S. at 195, 89 S. Ct. at 1663.

IV.

The propriety of requiring the exhaustion of an adequate State administrative remedy prior to the institution of a federal suit brought by a State prisoner pursuant to 42 U.S.C. §1983 cannot be gainsaid. Maryland's Inmate Grievance Commission provides a forum where State prisoners can fairly air their grievances, and receive relief where warranted; the virtues of requiring the exhaustion of administrative remedies prior to the commencement of judicial action have been extolled since the *Prentis* decision in 1908, and apply at least as dynamically in State prisoner cases as in others where administrative relief is available; State prisoners constitute a unique class of citizens in which the State has an extraordinary interest, unsurpassed by any other group; our federal

mode of government, as expounded most recently in the *Younger* line of cases, establish that federal-State relations are particularly sensitive with regard to State prisoners, and ought not be exacerbated by the establishment of an unyielding rule of law which allows the States to be bypassed entirely in an area which is of paramount interest to them; and, the disproportionate attention which the federal courts have had to give State prisoner cases — so weighty a burden that the Chief Justice of the United States, the Federal Judicial Center, numerous federal judges, and commentators have all called for reform — is a very real impediment to the sound administration of justice. Each of these factors augur in favor of an exhaustion requirement in the face of an adequate State remedy — in unison they demand it.

The essential difference between the instant case and the *Monroe* line of decisions is the availability here of an adequate administrative remedy in the form of the Maryland Inmate Grievance Commission. In *Monroe* the complaint alleged "that 13 Chicago police officers broke into petitioners' home in the early morning, routed them from bed, made them stand naked in the living room, and ransacked every room, emptying drawers and ripping mattress covers." All of this, along with other subsequent indiscretions, was accomplished without a search warrant. *Monroe v. Pape, supra,* 365 U.S. at 169, 31 S. Ct. at 474. While it was unsuccessfully argued "that under Illinois law a simple remedy [was] offered for that violation and that, so far as it appears, the courts of Illinois [were] available to give petitioners . . . full redress," 365 U.S. at 172, 81 S. Ct. at 476, the *Monroe* fact pattern did not include any mention of an administrative remedy.

In the cases which follow *Monroe,* the same, or highly similar, situations prevailed. *See Wilwording v. Swenson, supra,* 404 U.S. at 250, 92 S. Ct. at 409 (impossible to determine whether administrative procedures existed, and, if so, which to pursue); *Houghton v. Shafer, supra,* 392 U.S. at 640, 88 S. Ct. at 2120 (requiring exhaustion would have been to demand a futile act); *McNeese v. Board of Educ., supra,* 373 U.S. at 674, 83 S. Ct. at 1437 ("[I]t is by no means clear that Illinois law provides petitioners with an administrative remedy sufficiently adequate to preclude prior resort to a federal court.").

Not allowing the States to play a meaningful role in the administration and improvement of their penal systems does more than cut sharply against the objective of fostering federal-State relations, as espoused in *Younger* and other cases arising in other than State prisoner contexts. If State prisoners are not required to initially seek relief through the Maryland Inmate Grievance Commission, the Commission's prestige and effectiveness will be seriously jeopardized. "[F]requent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures," *McKart v. United States, supra,* 395 U.S. at 195, 89 S. Ct. at 1663.

If the adequacy of State administrative remedies is not allowed to serve as a basis for requiring their exhaustion before resort to the federal courts is undertaken in civil rights actions, existing State administrative bodies will begin to atrophy, and a vital incentive to the States' improvement of their own remedies will be removed. *See* Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape,* 82 Harv. L. Rev. 1486, 1494 (1969). In one of his classic

dissenting opinions, Mr. Justice Brandeis acclaimed the soundness of encouraging the States to experiment "in things social."

> Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

New State Ice Co. v. Liebmann, 285 U.S. 262, 311, 52 S. Ct. 371, 386-87 (1932) (Brandeis, J., dissenting).[10] *See also San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 50, 93 S. Ct. 1278, 1305 (1973); *Johnson v. Louisiana*, 406 U.S. 356, 386, 92 S. Ct. 1643, 1646 (1972) (Douglas, J., dissenting).

Maintaining and administering prisons is one of the oldest and most visible manifestations of social policy in which States engage, and recalls a familiar quotation from the writings and speeches of Winston Churchill: "The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country." Our 50 State laboratories must be encouraged to develop and refine methods for dealing with inmate complaints. While the Petitioners believe that Maryland has already achieved a viable administrative apparatus in the form of the Inmate Grievance Commission, it is also expected that the Commission will improve as it

[10] The present day validity of the majority's opinion in *New State Ice Co.* is highly dubious, and "belongs to that vintage of decisions which exhalted substantive due process by striking down state legislation which a majority of the Court deemed unwise," North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 164, 94 S. Ct. 407, 412 (1973), *overruling* Liggett Co. v. Baldridge, 278 U.S. 105, 49 S. Ct. 57 (1928).

evolves. Maryland pioneered the creation of an administrative mechanism responsive to prisoner complaints, and provided the impetus to her Sister States to do likewise. Now at least 23 States have instituted some form of inmate grievance procedure (Pet. Amici Br. 13-18 n.1; CCJ Br. 6-9, 16-18). This multitude of approaches is simply a reflection of the "complexity of the task" (CCJ Br. 9) before them. The States should not be inhibited from pursuing the search for the elusive "best answer." Extending the non-exhaustion standard of *Monroe* to cases where adequate State remedies exist will inhibit, if not completely squelch, all State activity in the direction of positive correctional reform.

During the 90-year interval between the enactment of Section 1 of the Ku Klux Act in 1871, 17 Stat. 13, which eventually became 42 U.S.C. §1983, and the Court's decision in *Monroe v. Pape, supra*, there is no evidence that anything but the usual exhaustion prerequisites applied to plaintiffs seeking relief under the federal law in federal courts. While a majority of the *Monroe* Court interpreted the legislative history of section 1983 as not requiring the exhaustion of inadequate State *judicial* remedies prior to the institution of a section 1983 action,[11] *Monroe* did not present the parallel question with regard to State *administrative* remedies. Indeed, however one may construe the legislative history of section 1983, it is certain that it cannot support the notion that Congress contemplated a non-exhaustion requirement regarding State *administrative* remedies. The reason for this is pellucid: there were no administrative remedies in 1871 which the Congress could have been concerned with. The concept of an "administrative

[11] *Compare* that portion of Mr. Justice Frankfurter's cogent dissenting opinion which criticizes the majority's interpretation of the legislative history, 365 U.S. at 224-37, 81 S. Ct. at 504-11.

remedy," as we know it today, was totally foreign to the post-Civil War period. Therefore, whatever *Monroe* or the legislative history of section 1983 stands for, neither can preclude, *ex proprio vigore*, the imposition of an exhaustion requirement in the presence of an adequate State administrative remedy.

Petitioners have urged that this Court's decisions from and after *Monroe* do not allow federal civil rights plaintiffs to seek judicial relief in the first instance where there exists an adequate State remedy capable of providing substantial relief. Although Petitioners earnestly believe that the foregoing statement is in perfect harmony with the law, if it is determined that the cases cannot be read to admit of such a precept, Petitioners submit that a "new rule" requiring exhaustion in these circumstances be adopted, even if some prior decisions need to be partially overruled in the process. This "new rule" which Petitioners suggest is really not a "new rule" at all, but simply a reaffirmation of the rule which prevailed for 90 years prior to *Monroe*. "The court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function," *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407-08, 52 S. Ct. 443, 447-48 (1932) (Brandeis, J., dissenting) (footnote omitted).

The lessons of experience have amply demonstrated the correctness of requiring the exhaustion of adequate State administrative remedies prior to the institution of federal suit, and there exists no express statutory command to the contrary. While Petitioners do not think it necessary, if the Court believes that some earlier decisions cannot stand consistently with such a rule, to that extent they should be modified or overruled.

"It is more important that the court should be right upon later and more elaborate consideration of the cases than consistent with previous declarations. Those doctrines only will eventually stand which bear the strictest examination, and the test of experience," *Barden v. Northern Pac. R.R.*, 154 U.S. 288, 322, 14 S. Ct. 1030, 1036 (1894).

CONCLUSION

For the reasons expressed above, and in the Briefs of Petitioners and Amici Curiae in Support of Petitioners, the decision of the United States Court of Appeals for the Fourth Circuit must be reversed.

Respectfully submitted,

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